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September 4, 2013

John F. Ribeiro
15 James Ave.
Winthrop, MA 02152

Re: Initiative Petition No. 13-09: Law to Prohibit Casino Gambling

Dear Mr. Ribeiro:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year. I regret that we are unable to certify that the proposed law complies with the requirements of Article 48, the Initiative, Part 2, Sections 2 and 3. Section 2 states in pertinent part: "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use[.]" As explained below, the law proposed by Petition No. 13-09 is inconsistent with this right as guaranteed in Article 10 of the Declaration of Rights, Mass. Const. Pt. I.

The proposed law, by prohibiting the Massachusetts Gaming Commission ("Commission") from issuing licenses for casinos or a slots parlor under the Commonwealth's expanded gaming law, G.L. c. 23K, would impair the implied contracts between the Commission and gaming license applicants that require consideration of and action on license applications in accordance with G.L. c. 23K. Contract rights are considered property and may not be "taken" by an initiative petition. E.g., Dimino v. Secretary of the Commonwealth, 427 Mass. 704 (1998) (initiative petition for law that would have invalidated bond covenants worked an uncompensated "taking" of bondholders' "property rights" and should not have been certified by Attorney General under art. 48); see Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 554 (1942) (contract between Commonwealth and corporation is property, protected by art. 10. of Declaration of Rights). Here, the proposed law would impair and thus "take" applicants' contract rights, without any provision for paying compensation. The proposed law is therefore inconsistent with the "right to receive compensation for private property appropriated to public use" and cannot be certified.

Our decision, as with all decisions on certification of initiative petitions, is based solely

on art. 48's legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed law. Below, we set forth the provisions of the proposed law and then explain in more detail why it cannot be certified under art. 48.

1. Description of the Proposed Law

The proposed law, entitled "An Act Relative to Illegal Gaming," provides in pertinent part as follows:

> SECTION 1. Section 7 of chapter 4 of the General Laws, as appearing in the 2012 Official Edition, is hereby amended by striking out clause Tenth and inserting in place thereof the following clause:
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> > "Tenth, 'Illegal gaming,' a banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding: (i) a lottery game conducted by the state lottery commission, under sections 24, 24A and 27 of chapter 10; (ii) pari-mutuel wagering on horse races under chapters 128A and 128C; (iii) a game of bingo conducted under chapter 271; and (iv) charitable gaming under said chapter 271."
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> SECTION 2. Chapter 23K of the General Laws, as appearing in the 2012 Official Edition, is hereby amended by adding the following section 72 following section 71:
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> > "Notwithstanding the provisions of this chapter or any general or special law to the contrary, no illegal gaming as defined in section 7 of chapter 4 shall be conducted or permitted in this commonwealth and the commission is hereby prohibited from accepting or approving any application or request therefor."

The effect of Section 1 of the proposed law, which replaces the existing definition of "Illegal gaming" with a new, shorter definition, is two-fold. It removes (1) an existing exemption for "a game conducted under chapter 23K," and (2) an existing exemption for "pari-mutuel wagering on . . . greyhound races under said chapter 128C[.]" Thus, games conducted under G.L. c. 23K -- that is, games conducted under Commission licenses for casinos and a slots parlor -- would now be illegal, and subject to existing state laws providing criminal penalties for, or otherwise regulating or prohibiting, activities involving illegal gaming. Similarly, pari-mutuel wagering on greyhound races under G.L. c. 128C, which is currently conducted under licenses issued by the Commission, would become "illegal gaming" and would be subject to the existing state laws just mentioned.

The effect of Section 2 of the proposed law is to prohibit the Commission from accepting any license applications or issuing any licenses for what is newly defined as "illegal gaming," including casinos, a slots parlor, or pari-mutuel wagering on greyhound races. Section 2 would also prohibit any such "illegal gaming" from being conducted or permitted in the

Commonwealth, a prohibition that would appear to extend to activities under any licenses that might already have been issued by the Commission when the proposed law took effect after the November 2014 election. It is not that effect on licenses already issued, but rather the proposed law's effect on the Commission's process for reviewing applications for licenses for casinos and a slots parlor, that is the focus of our analysis.[1]

2. Scope of Review

In determining whether a proposed law contains a matter that art. 48 excludes from the initiative process, the Attorney General may not confine herself to the face of the petition. Rather, "the Attorney General should consider the facts implied by a petition's language and officially noticeable facts when determining whether to certify that a submitted petition contains only subjects not excluded from the initiative petition's operation." Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 402 Mass. 750, 759 (1988) (emphasis added); see id. at 758 ("the Attorney General should consider petitions' factual impact when certifying that they do not contain excluded subjects"). "Official notice includes matters subject to judicial notice, as well as additional items of which an agency official may take notice due to the agency's established familiarity with and expertise regarding a particular subject area." Id. at 759 n.7.

Here, as set forth in the analysis that follows, we take official notice of certain matters set forth on the Commission's website concerning its application process for gaming establishment licenses (that is, licenses for casinos and a slots parlor), including the Commission's encouragement for numerous entities to apply, and the amounts paid by such applicants to the Commission in furtherance of the application process.

3. The Contracts at Issue

In G.L. c. 23K, the Legislature established a rigorous and detailed process for Commission review of applications for gaming establishment licenses. The Commission itself further specified many of the details of that process in its regulations, in particular 205 C.M.R. Parts 110-119, and in the Commission's application materials available at http://massgaming.com/licensing-regulations/applications/ (last visited 9/3/2013). We take notice that the Commission actively encouraged the submission of gaming license applications, as indicated in the January 15, 2013 statement of the Commission's Chairman, announcing that eleven entities had applied for the three casino licenses and one slots parlor license available. The Chairman stated, "The Massachusetts legislation drafted the Expanded Gaming Act prioritizing competition as key criteria. The gaming commission has vigorously carried that charge forward resulting in the achievement of a gaming competition that is robust and primed to

[1] We take notice that under the Commission's current schedule, it expects, but has not bound itself, to have issued licenses by the time the proposed law could take effect in late 2014. See http://massgaming.com/wp-content/uploads/Commissioners-Packet-7.11.13.pdf at p. 8 (last visited 9/4/2013). The Phase I application process for the Region C casino license has not yet closed; the currently-projected date for issuance of that license is November 20, 2014. Id.

obtain that absolute maximum benefits in job creation and economic growth to the residents of the commonwealth." See http://massgaming.com/wp-content/uploads/Massachusetts-Gaming-Commission-Receives-11-Pre-Qualifying-Applications-for-Expanded-Gaming-License-1-15-2013.pdf (last visited 9/3/2013).

Under G.L. c. 23K, § 15(11), applicants were required to pay a non-refundable $400,000 application fee, "provided, however, that if the costs of the investigation exceed the initial application fee, the applicant shall pay the additional amount to the commission within 30 days[.]" We take notice of Commission records indicating that as of June 8, 2013, the eleven applicants had paid the Commission $4.4 million in application fees, plus $4.2 million in charges for additional investigations related to the applicants. As of June 8, 2013, the Commission had spent $6.8 million of that amount. See http://massgaming.com/wp-content/uploads/Commissioners-Packet-7.11.13.pdf, p. 7 (last visited 9/3/2013).

The Legislature declared in G.L. c. 23K, § 1(1) (with emphasis added), that "ensuring public confidence in the integrity of the gaming licensing process and in the strict oversight of all gaming establishments through a rigorous regulatory scheme is the paramount policy objective of this chapter[.]" The goals of the licensing process also may be said to include (1) obtaining the maximum possible benefit for the people of the Commonwealth, as well as the Commonwealth itself and its political subdivisions, from the expansion of gaming in Massachusetts; and (2) establishing an honest and open procedure in the competition for licenses, and placing applicants on an equal footing in that process.

In the analogous context of the Commonwealth's public bidding laws, the Appeals Court has recognized the existence of an implied contract between bidders and the public contracting authority. Noting the rule that "in matters of substance there must be strict compliance with the requirements of [the public bidding laws,]" the Appeals Court held that "[t]he 'honest and open procedure for competition' among the various bidders that is one of the fundamental objectives of the competitive bidding statute must necessarily entail fair consideration of all the submitted bids in accordance with the applicable sections of the statute." Paul Sardella Const. Co., Inc. v. Braintree Housing Authority, 3 Mass. App. Ct. 326, 332, 333 (1975) (quoting Interstate Engineering Corp. v. City of Fitchburg, 367 Mass. 751, 758 (1975).[2] "Many courts [in other jurisdictions] have held that it is an implied condition of every invitation for bids issued by a public contracting authority that each bid submitted pursuant to the invitation will be fairly considered in accordance with all applicable statutes. . . . Should the public contracting authority fail to give such consideration, the implied contract formed by the submission of such a bid is broken, and recovery of bid preparation costs is deemed a proper remedy." Sardella, 3 Mass.

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[2] The type of procedural violation and resulting prejudice at issue in Sardella is illustrative. Sardella was originally determined to be the lowest responsible and eligible general bidder, but when a selected sub-bidder failed to execute its subcontract, the public contracting authority did not follow the statutory requirement that it cooperate with Sardella to select another sub-bidder and adjust Sardella's total contract price as necessary. Instead, the contract was awarded not to Sardella, but to the bidder originally determined to be the third lowest bidder. Sardella, 3 Mass. App. Ct. at 327-28, 330.

App. Ct. at 333 (citations omitted; emphasis added). The Sardella court adopted this remedy as the appropriate result under Massachusetts law, id., as it "best effectuate[d] the legislative objectives underlying the statute[.]" Id. at 334.[3] The Supreme Judicial Court endorsed this result in Paul Sardella Const. Co., Inc. v. Braintree Housing Authority, 371 Mass. 235, 243 (1976). The rule has been applied numerous times since Sardella. E.g., E. Amanti & Sons, Inc. v. Town of Barnstable, 42 Mass. App. Ct. 773, 778 (1997).[4]

We conclude that a similar implied contract is created by the chapter 23K gaming establishment licensing process. In accordance with its statutory mission, the Commission actively sought applications, in order to maximize the benefits of expanded gaming in the Commonwealth, and received eleven applications. In recognition of each applicant's payment of an initial and very substantial $400,000 application fee, plus additional amounts for investigation of its application that in the aggregate total $4.2 million to date, the Commission is bound to consider such applications in accordance with statutory and regulatory licensing procedures and criteria, and to award licenses to such applicants, if any, as the Commission in its discretion determines best meets the licensing criteria. Were the Commission not to act in accordance with this process, a damages remedy, analogous to Sardella's bid-preparation-costs remedy, would appear to be available.

Of course, the analogy to the public bidding process is not perfect. The Commission enjoys a great deal more discretion in the award of licenses than does a public contracting authority in the award of a contract. The Commission need not award any licenses at all if it does not find that any of the applicants meets the statutory and regulatory standards. No court has determined whether the Commission's licensing process under G.L. c. 23K is subject to the principle, applicable to the public bidding laws, that "in matters of substance there must be strict compliance[.]" Interstate Engineering Corp., 367 Mass. at 757 (citations and internal quotations omitted). The nature of the activities being licensed by the Commission is quite different, with potentially a much greater impact on the public welfare than the award of a typical public contract. In recognition of the unique nature of the Commission's task, the Legislature has provided: "The commission shall have full discretion as to whether to issue a license. Applicants shall have no legal right or privilege to a gaming license and shall not be entitled to any further review if denied by the commission." G.L. c. 23K, § 17(g). And "any license awarded by the commission shall be a revocable privilege and may be conditioned, suspended or revoked" on a variety of grounds. G.L. c. 23K, § 1(9).

Nevertheless, although no applicant has a contractual or any other right to the issuance of a Commission license, we must conclude that, in furtherance of the purposes of G.L. c. 23K,

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[3] Of course, where another effective remedy, such as injunctive relief to ensure the statutes are followed, is available and is in the public interest in the circumstances, an award of damages on a contract theory might well be unnecessary to further the statutory purposes.

[4] The Appeals Court has also held that to further the purposes of the public bidding laws, a bidder injured by a public contracting authority's bad faith violation of the bidding laws may recover that bidder's lost profits. Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass. App. Ct. 349, 359 (1987).

parties who accepted the Commission's invitation to apply, and paid substantial application and additional investigation fees, do have an implied contractual right to Commission action on their applications in accordance with statutory and regulatory criteria. This includes a right to have the Commission issue licenses to those applicants, if any, that the Commission in its discretion determines are appropriate. Recognition of this implied contract, enforceable in a manner analogous to Sardella, furthers the declared legislative purpose of "ensuring public confidence in the integrity of the gaming licensing process" as one of "the paramount policy objective[s]" of the Commonwealth's expanded gaming law. G.L. c. 23K, § 1(1).

Indeed, even in contexts other than the public bidding laws, the Supreme Judicial Court has recognized that it is sometimes necessary to recognize an implied contract, enforceable through monetary relief against a state agency, in order to further the purposes of a statute. See Bates v. Director of Office of Campaign and Political Finance, 436 Mass. 144, 169-72 (2002) (citing cases). In Bates, a private party had accepted a statutory invitation to participate in a program determined to be in the public interest, and did so in reliance on the statute obligating an agency to take action in return (in the form of payments benefiting that private party). The Supreme Judicial Court, calling the statute "a complex transactional scheme that establishe[ed] an ongoing regulatory framework" between the state and private parties seeking the benefits of the statute, recognized the existence of an implied contract or "bargain," the agency's breach of which allowed the private party to recover damages, in order to achieve the statutory objectives. Bates, 436 Mass. at 169, 172 (referring to "bargain" entitling candidates qualifying for payments under "clean elections" law to recover damages for agency's non-payment); id. at 178-79 (ordering money judgment for candidate).

4. The Proposed Law's Effect on the Contracts

The law proposed by Petition No. 13-09, by prohibiting the Commission from issuing casino and slots-parlor licenses, would prevent the Commission from performing part of its implied contractual obligation: specifically, its obligation to issue licenses to those applicants, if any, it deems appropriate.[5] The proposed law would directly make the Commission's performance of the implied contract illegal. For purposes of determining whether this would result in a "taking" of applicants' contract rights, which are property, it is necessary to determine whether this prohibition on Commission action would constitute an "impairment" of those contract rights, or would merely result in an ordinary breach of contract. That question, in turn, appears to depend on whether a damages remedy for breach would be available to the applicants. See, e.g., TM Park Ave. Associates v. Pataki, 214 F.3d 344, 348-49 (2nd Cir. 2000); University of Hawaii Professional Assembly v. Cayetano, 188 F.3d 1096, 1102-04 (9th Cir. 1999); Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250-52 (7th Cir. 1996) (Posner, C.J.). This same test has recently been applied by a federal district court in Massachusetts. Single Source,

[5] The proposed law would also prohibit further gaming under such Commission licenses as may already have issued at the time the proposed law became effective in late 2014. In light of our conclusion as to the proposed law's prohibition on the issuance of licenses, we need not now determine the significance, for art. 48 purposes, of its prohibition on further gaming under licenses already issued.

Inc. v. Central Regional Tourism Dist., Inc., No. 08-40176-FDS, 2011 WL 1877700, slip op. at 13 (D. Mass. May 17, 2011).

Here, we conclude that the proposed law would not leave open a damages remedy against the Commission, and therefore it constitutes an impairment of contract. The Commission, if sued for breach of the implied contract referred to above, could defend on the basis that performance of the contract had, without fault of the Commission, become impossible or impracticable due to the change in law, meaning that its duty to perform had been discharged and no damages were due. See Restatement (Second) of Contracts §§ 261, 264 (1981).[6]

The Commission could also defend on the basis that, according to newly-declared public policy, the issuance of gaming licenses was now prohibited. Accordingly, it would be contrary to public policy, and would not further the policy of G.L. c. 23K or any other statute, to award damages against the Commission, in the form of application costs or otherwise, for refusing to do what the statute then forbade. Cf. Sardella, 3 Mass. App. Ct. at 332-34 (reviewing statutory purposes to determine appropriate remedy for governmental breach of implied contract formed under competitive bidding statute); Bradford & Bigelow, 24 Mass. App. Ct. at 357-59 (same).

Nor would the remedy of restitution, on a theory of unjust enrichment, be available to the applicants.[7] "Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to repay the injured party.... [It] is appropriate only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for [one of them] to retain it." Santagate v. Tower, 64 Mass. App. Ct. 324, 329-30 (2005) (citations and internal quotations omitted). Unjust enrichment is the "retention of money or property of another against the fundamental principles of justice or equity and good conscience." Id. at 329 (citations and internal quotations omitted). Where the applicants have paid

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[6] Section 261 of the Restatement provides: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Section 264 provides: "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." The drafters explain that "It is "a basic assumption on which the contract was made" that the law will not directly intervene to make performance impracticable when it is due. Therefore, if supervening governmental action prohibits a performance or imposes requirements that make it impracticable, the duty to render that performance is discharged[.]" Id. § 264, comment a. "Under the rule stated in this Section, the regulation or order . . . may emanate from any level of government and may be, for example, a municipal ordinance or an order of an administrative agency. Any governmental action is included . . . ." Id. comment b.

[7] Counsel for the proponents of Petition No. 13-09 has suggested that where a contract is unlawful, restitution of monies paid under the contract may be ordered where one party was more at fault than the other in the contracting process. White v. President of Franklin Bank, 22 Pick. (39 Mass.) 181, 186 (1839); see Berman v. Coakley, 243 Mass. 348, 351 (1923) (citing White). White, however, involved a contract unlawful when made, 39 Mass. at 184--unlike here where the implied contract between applicants and the Commission is lawful and would only be rendered otherwise if the proposed law were approved by the voters. Moreover, there would be no basis here to find the Commission "at fault" vis-à-vis the applicants.

application and investigation fees to the Commission, and the Commission has spent those amounts on the purposes for which they were paid, as part of the licensing process that both the applicants and the Commission have an interest in furthering, it is difficult to see how the Commission's retention of such monies (which it has spent) would be unjust.[8]

Thus there is, at a minimum, serious doubt that the applicants would have an effective remedy against the Commission for its inability, based on enactment of the proposed law, to perform its contractual duty to conduct the licensing process in accordance with G.L. c. 23K. The proposed law would therefore not merely cause a breach of the contract but instead would result in its impairment. We must therefore consider whether such an impairment would be lawful under the constitutional standards for evaluating impairments of contract. If the impairment would be unlawful, it would result in a "taking" of property, meaning that Petition No. 13-09 could not be certified.

5. Analysis of "Takings" and "Impairment" Issues

In Dimino v. Secretary of the Commonwealth, 427 Mass. 704 (1998), the court ruled that an initiative petition proposing a law that would have invalidated certain bond covenants worked an uncompensated "taking" of the bondholders' "property rights" and therefore should not have been certified by the Attorney General under art. 48. The covenants pledged certain Massachusetts Turnpike Authority toll revenues as security for the repayment of $1.7 billion in bonds issued by the Authority. Id. at 705-06, 707. The proposed law would have reduced and then eliminated tolls on the Turnpike. Id. at 706. "[T]he bondholders' rights to the authority's revenue under the trust agreements are 'property' protected by art. 10," and "[t]he petition's elimination of toll revenue constitutes a full-blown appropriation of the bondholders' right to that property." Id. at 709. Because the law proposed by the petition contained no sufficiently definite method of compensating the bondholders, it was inconsistent with art. 10's right to compensation for private property taken for public use. Id. at 710-11.

The Dimino court did not expressly and separately analyze whether the proposed law's interference with the bondholders' contract rights would have worked an impairment of contract in violation of the federal Contracts Clause. See U.S. Const. Art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"). However, Dimino relied heavily on Opinion of the Justices, 356 Mass. 775, 793-94 (1969), where the Justices did conclude that a proposed toll freeze would be such an unconstitutional impairment. See Dimino, 427 Mass. at 709 & n.4. Thus Dimino does not mean that any proposed initiative law that abrogates a contract right constitutes a per se taking of property. Indeed, it would be odd if a minor legislative

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[8] Moreover, if the applicants' damages remedy for the Commission's breach of the implied contract would be, as in Sardella, the costs of preparing the application, then restitution of their application and investigation fees would not be an adequate remedy, because many (if not all) of the costs required to prepare a complete application would not have been paid to the Commission. For example, as part of the application process, applicants must negotiate agreements with host and surrounding communities and then work with host communities to obtain binding ballot votes approving the host community agreements. G.L. c. 23K, § 15 (8), (9), (13).

interference with contract rights could pass muster under the Contracts Clause, yet constitute a "taking" of "property" requiring the payment of monetary compensation under art. 10. Instead, for a legislative interference with contract rights to constitute a "taking," it must rise to the level of an unconstitutional impairment of contract.

We therefore proceed to analyze whether the proposed law survives Contracts Clause scrutiny. The Supreme Court has held that a law that works a substantial impairment of a contractual relationship may nevertheless be upheld "if it is reasonable and necessary to serve an important purpose." U. S. Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977); see Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 411-12 (1983), Allied Structural Steel Co. v. Spannaus, 433 U.S. 234, 244 (1978); Massachusetts Community College Council v. Commonwealth, 420 Mass. 126, 133 (1995). "The extent of impairment is certainly a relevant factor in determining its reasonableness." U.S. Trust, 431 U.S. at 27; see Allied Structural Steel, 438 U.S. at 245 ("Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation"). Also, "[a]n impairment is not a reasonable one if the problem sought to be resolved by an impairment of a contract existed at the time the contractual obligation was incurred. . . . If the foreseen problem has changed between the time of the contracting and the time of the attempted impairment, but has changed only in degree and not in kind, the impairment is not reasonable." Massachusetts Community College Council, 420 Mass. at 133 (citing U.S. Trust, 431 U.S. at 32).

Here, the extent of the impairment is very substantial. The law proposed by Petition No. 13-09 would not merely regulate or impose limits on the implied contractual gaming licensing process, but would bring it entirely to a halt. That is a strong indication of the law's "unreasonableness" in the U.S. Trust sense. Moreover, the proposed law involves an issue--the social and economic problems that might result from allowing casinos and a slots parlor in the Commonwealth--that was not merely foreseeable, but was expressly considered at length, when the Legislature, after many years of vigorous debate both inside and outside of the State House, enacted the "Act Establishing Expanded Gaming in the Commonwealth" in 2011. The Legislature assessed the merits of expanded gaming and decided that the public interest was best served by allowing a limited number of casinos and one slots parlor. We are unable to discern how the problems that might result from such expanded gaming have changed since 2011, let alone changed in kind rather than in degree.

We recognize the Supreme Judicial Court's recent reaffirmation that an initiative petition, like a law enacted by the Legislature, may prohibit gaming, and that gaming license holders do not necessarily have any property interest in their licenses. Carney v. Attorney General, 451 Mass. 803, 816-17 (2008) ("Carney II"). In Carney II, the court upheld the Attorney General's certification of an initiative petition to end greyhound racing, and after rejecting the claim that the petition worked a "taking," the court added the following observation:

> Finally, it is worth pointing out that gambling on dog races is a heavily regulated industry that only exists by virtue of legislatively created narrow exceptions to common-

> law and statutory bans and that, "because of the nature of the business[, it] can be abolished at any time that the Legislature may deem proper for the safeguarding and protection of the public welfare." Selectmen of Topsfield v. State Racing Comm'n, 324 Mass. 309, 315 (1949). "Although mere 'participat[ion] in a heavily regulated industry' does not bar a plaintiff from ever prevailing on a takings claim, . . . it does greatly reduce the reasonableness of expectations and reliance on regulatory provisions."

Carney II, 451 Mass. at 817. Of course, by the time Carney II was decided in 2008, participants in the dog racing industry had long been on notice that there were serious voter efforts to abolish dog racing. A proposal to do so appeared on the ballot in 2000 and was defeated by a margin of less than two percent. See 2000 Massachusetts Elections Statistics, Pub. Doc. No. 43, at 542. Another proposal to do so garnered enough signatures to appear on the 2006 ballot, but the petition was invalidated on grounds unrelated to any takings claim. See Carney v. Attorney General, 447 Mass. 218 (2008) ("Carney I"). The petition at issue in Carney II was thus the third, and ultimately successful, effort to prohibit dog racing involving wagering. The expectations of participants in that industry, as of 2008, must be viewed in that context.

Thus we do not read Carney II to hold that participants in the heavily regulated gaming industry can never have any reasonable expectations or any reasonable reliance on regulatory provisions. Here, to be sure, applicants for gaming licenses will have no property rights in any licenses they may receive at the end of the application process. But the Commission, properly acting pursuant to G.L. c. 23K as directed by the 2011 Legislature, has invited applicants to apply for licenses, and has accepted millions of dollars from applicants for the purpose of evaluating those applications. The applicants do have a reasonable expectation, and indeed an implied contractual right, that the application process itself will play out in accordance with G.L. c. 23K. They have a reasonable expectation that the Commission will remain legally free to award licenses to such applicants as it deems appropriate, as the Legislature envisioned less than two years ago when it legalized casinos and a slots parlor. That the Legislature (or the voters) may abolish legalized gaming at any time does not necessarily imply that the Legislature (or the voters), after inducing private parties to act, can suddenly reverse course without any adverse legal consequences for the Commonwealth. The Legislature could indeed abolish gaming, if it determined that the benefits of doing so outweighed the legal and other costs, but art. 48 does not allow the voters to do so at this time.[9]

For the foregoing reasons, the law proposed by Petition No. 13-09 would impair applicants' implied contractual rights in violation of the Contracts Clause, and because it makes

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[9] If the Legislature were to pass a law such as is proposed by Petition No. 13-09, our conclusion here necessarily implies that such a law could be challenged in court and invalidated as an unconstitutional impairment of contract. That would leave the way open for applicants to sue for damages if the Commission did not follow through with the licensing process. Alternatively, the Legislature could pass a law that terminated the licensing process but allowed for payment of appropriate amounts to applicants. Under art. 48, however, these options are unavailable to the people via an initiative petition--the first because it would result in a taking of property, as discussed above, and the second because it would almost certainly require making a "specific appropriation of money from the treasury of the commonwealth," which an initiative petition may not do. See art. 48, Init., Pt, 2, § 2.

no provision for compensation, it would violate art. 10's right "to receive compensation for private property appropriated to public use." We are therefore unable to certify the petition under art. 48.

Very truly yours,

Peter Sacks
State Solicitor
617-963-2064

cc: William Francis Galvin, Secretary of the Commonwealth